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SUPREME COURT, U.S.

(3)

No. 97-2078

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

Ray Watson,

Petitioner,

v.

University Medical Center, Mike Parker, Bill Andrews,

Respondents

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF IN OPPOSITION

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Questions Presented for Review

1.

Petitioner did not allege a claim of conspiracy in his complaint, nor did he endeavor to prove such claim. Petitioner brought a claim of discrimination against the respondents. However, the trial court misrepresented clear facts and simply concluded that a claim of conspiracy had been brought and was not proven by petitioner. Did the trial and appellate courts:

(a) abuse their discretion and violate petitioners' due process rights by granting a summary judgment on fictitious grounds ?

(b) Depart from the usual and accepted judicial procedures.

2.

In Anderson v. Liberty Lobby Inc., 477 U.S. 242, this court held that only "*material facts*" would preclude the entry of summary judgment. Petitioner submitted affidavits that created a genuine issue of material fact that would have affected the outcome of a trial.

(a) Were these affidavits sufficient to defeat a motion for summary judgment ?

(b) Did the court abuse its discretion by failing to accept petitioners' affidavits and other allegations as true ? *Catrone v. 105 Casino Corporation, 414 P 2d, 106 Nevada Supreme Court.*

(c) Does the decisions of the trial court, and subsequent affirmation by the appellate court, conflict with Anderson.?

3.

Petitioner established many genuine issues of material fact demonstrating that the defendants proffered nondiscriminatory reasons were unworthy of credence. Are these genuine issues of material fact sufficient to defeat a summary judgment in light of this courts' holding in *Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089, 1095 (1981).*

4.

Petitioner's contractual rights in Article 1V of his union contract, as well as University Medical Center policies ("UMC"), prohibited discrimination in employment, promotion and all areas of work life. Respondent Mike Parker refused to grant petitioner, the only black applicant for two full-time security positions, an interview. Petitioner was the most senior applicant and had received prior satisfactory evaluations from respondent Parker.

Parker interviewed seven other applicants, while holding that his reasons for denying petitioner an interview was based on a *"survey"* conducted in lieu of established governmental policies regarding evaluations. In his decision, the UMC Hearing Officer decided that petitioner should be reinstated and given an opportunity for the next full time position. Parker did neither. The questions for this court are:

(a) Can a public employee be denied his constitutional rights to property by a ad hoc *"survey"* arbitrarily substituted for the legally approved evaluation process established by this political subdivision ?

(b) Can a public employee be denied an interview for a position in light of the contractual and governmental policies prohibiting discrimination in promotion and employment ?

(c) In light of Hearing Officer Bill Andrews' decision that petitioner should be reinstated and given and opportunity to interview for the next full-time position, does respondents have the right to disregard his decision ?

5.

In Haines v. Kerner, 404 U.S. 519, this court held that a pro se litigant's complaint must not be dismissed unless it appears beyond a doubt, that *"he cannot get relief under any set of facts"*.

(a) Does the true and material facts of this case demonstrate, beyond a reasonable doubt, that petitioner should have been afforded his constitutional right to trial on the merits ?

(b) Does the dismissal of petitioners' claims conflict with the principles reached in Haines ?

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Jurisdiction

The date the Ninth Circuit court of Appeals decided my case was December 15, 1997. A timely petition or rehearing was denied by the United States Court of Appeals on March 27, 1998 and a copy of the order denying rehearing appears the petition at **A7.**

I. "Substantial Evidence Contradicting Employer's Proffered Evidence of Non-discriminatory Motivation in Promotion Precludes Summary Judgment"

Petitioner requests this court review Godwin v. Hunt Wesson, Inc., 96-56830 (9th cir), filed August 11, 1998, which is new, controlling case law decided while this case was pending. This new law will affect the outcome of this petition. The court held in Godwin that "*A close review of our decisions reveals that in this circuit a plaintiff who offers substantial evidence that the employer's proffered reasons were not reliable, see e.g., Lindahl v. Air France, 930 F.2d 1434, 1438-39 (9th Cir.) 1991), or direct evidence of discrimination, see e.g. Cordova v. state Farm Ins. , 124 F 3d 1145, 1150 (9th Cir. 1997) has made a sufficient showing to create triable issues with respect to the employer's motivation*". The court continued "*Although shifting explanations are acceptable when viewed in the context of other surrounding events..... **such weighing of evidence is for a jury, not a judge.** Payne v. Northwest Corp., 113 F 3d. 1079, 1080(9th Cir. 1997)*".

II. "No Weighing of the Evidence"

Respondent Parker alleges that Lead Officer Larry Mathis participated in his "*survey*" and that he had submitted an unsigned, undated evaluation of petitioner. RA 62-66. However, Mathis submitted an affidavit stating he was not asked, nor did he participate in Respondent's unofficial, *ad hoc* evaluation. Petitioner's exhibit A 22. Obviously Respondents statement to the Hearing Officer is in conflict with the affidavit of Mathis and calls into question the overall credibility of Parker's proffered non-discriminatory reasons. *Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089, 1095 (1981).*

On page 17 of Respondent's opposition brief he states: "*Assuming arguendo petitioner's contention that Larry Mathis did not participate is correct, (despite the clear factual evidence that disagrees with this), this court must ask itself what effect removing Mr. Mathis from the evaluation survey may have had on petitioner's claims. Clearly the answer is "none"*. Counsel is asking the highest the HIGHEST COURT IN THIS LAND to weigh evidence in a motion for summary judgment. The only reason this ludicrous case is before this prestigious body is because the lower courts weighed the evidence.

Counsel is well aware that if any genuine issue of material fact exists, *it is not the function of any court to weigh that evidence. Even if the weight or believability of the evidence is clearly in favor of one party, the other party is entitled to a trial by jury to determine the facts.* Anderson v. Liberty Lobby, Inc., 477 U S 242. (1986). As a matter of law, this court must reject counsel's request to weigh evidence. Conflicting affidavits regarding Respondent Parker's ad hoc survey speak volumes as to genuine issues of material fact sufficient to defeat a motion for summary judgment.

III. Both Courts Ruled Petitioner Was Qualified

On one hand, Parker stated that his reason for not interviewing petitioner was that he was **not qualified**. RA 94-95. On the other hand, he contended that Francine Quick and John Seeno **called petitioner for an interview**. RA 72-73. This is a clear example of conflicting, pretextual "*shifting explanations*" [1] by Respondent Parker, which he employed to discriminatorily deprive petitioner of equal protection of the law. *Payne v. Northwest Corp., 113 F 3d. 1079, 1080 (9th Cir. 1997).*

However, both courts resolved the "*qualification*" issue. In RA 95, par. 2 of the opposition brief, the Respondents state: "*Adequate justification was presented by Mike Parker as to the reasons he felt Ray Watson was not a qualified applicant.*" Then on page 16, the Respondents wrote: "*In this case, the initial establishment of a prima facia case was held by judge McKibben to be met. Petitioner belongs to a protected minority class; established he was minimally qualified for the full time security officer position....*" Moreover, the Appellate court affirmed the district courts decision that petitioner was qualified. Since the both the district and appellate courts agreed that petitioner was qualified, obviously Respondent's "*shifting*" proffered non-discriminatory reasons lack credibility and the matter must be determined by a jury. Burdine Id at 1095.

IV. Hearing Officer Decision is not a "*Suggestion*"

Petitioner reminds the court of rule 15.2 which admonishes counsel that "*they have an obligation to the court to point in the brief in opposition, and not later, any perceived misstatement made in the petition*".

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[1] Godwin v. Hunt Wesson, Inc., 96-56830 (9th Cir., 1998)

Yet on page 2 of his brief in opposition, counsel deliberately attempts mislead this court by misstating petitioner's allegations. Counsel writes:

> *"He further argued UMC failed to comply with **suggestions** from Hearing Officer William Andrews, that UMC provide petitioner with an interview on the next full time opening in the department"*

Counsel's statement is disingenuous and dissimulates the true facts. Pursuant to his legislative authority, the hearing officer made a decision. Counsel's misplaced characterization that his decision was a *"suggestion"* should offend the intelligence of this court. In fact, the hearing officer wrote:

> *"I feel UMC administration should write a policy for criteria to receive an interview. Also, **reinstate Ray Watson** on per diem, with the opportunity to improve on weaknesses as stated in the management review, and if improvement is made, he should be given an interview on the next full time opening in the department."*

Counsel dissimulates the statement and also conveniently omits the fact that the decision required that petitioner be **"reinstated"**[2] and then given interviews under the above conditions. Counsel is well aware that issue alone is a material fact and is sufficient to defeat a motion for summary judgement. Anderson v. Liberty Lobby, 477 U.S. 242,248 (1986); Haines v. Kerner, U S 404, 519

To circumvent the Hearing Officers' decision that petitioner should be reinstated, Respondents alleged that they *"still offered Petitioner employment. Indeed he was given an opportunity at UMC on a per diem basis starting with zero hours again. RA 92 . Petitioner refused."* Reinstatement as defined in Black's law dictionary, is *"to put back, or establish again, as in a former position or state."* **It does not mean** to *invent, create, manipulate* or *alter* in any manner, the clear, unambiguous meaning of the word attempting to refine the hearing officer's decision.

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[2] Reinstate: **To put back, or establish again, as in a former position or state.**

Reinstatement could have been accomplished by the stroke of the pen, a one-line letter, a brief telephone call or a messenger.

Furthermore, the *"zero-hour-job-issue"* was pretextual and only surfaced after petitioner filed this action. Petitioner presented the affidavit of Carlos Henderson which clearly contradicts this eleventh hour, pretextual affidavit by Respondents. Petitioner's exhibit A20. Finally, the willful refusal to comply with the hearing officer's unambiguous decision demonstrates discriminatory animus, is a serious violation of petitioner's due process rights and must be heard by a jury.

V. Respondent's Ad Hoc Evaluation Discriminatory

Respondent Parker admittedly created a spontaneous *"survey"* that was *"inconsistent"* with UMC authorized evaluation process. RA 46. This so-called *"survey"* , was designed by Respondent Parker to disqualify petitioner for an interview. In stark contrast with his ad hoc *"evaluation by committee"*, Respondent Parker's official UMC evaluation of petitioner (RA 49), rated Petitioner's CONDUCT/BEHAVIOR as *"Excellent"*.. A reading of his evaluation shows either *"Excellent" of "Satisfactory"* ratings by Respondent Parker and he even concludes with the OVERALL RATING with glowing, profuse comments as:

1. Excellent personality
2. Very dependable coming in to work
3. Excellent ability

Clearly, Respondent Parker's ad hoc evaluation was inconsistent with the official evaluation process and a jury must decide if his surprise *"survey"* is a pretextual vehicle for his discriminatory conduct. Parker provided no notice to petitioner of his departure from the official UMC evaluation procedure, nor any evidence that his *"survey process"* was universally applied to all departments of UMC. Clearly, his *"survey"* was concocted to discriminatorily deprive petitioner of equal protection of the law. This is a genuine issue of material fact that must be heard of a jury.

"If you can't fight on the law, fight on the facts.
If you can't fight on the facts, fight dirty....."

Clearly, that old adage applies to counsel's insidious arguments. On page 24 and 25 his opposition brief, he attempts to mislead this court with completely irrelevant, non-applicable cases.

Knowing full well that these citations are disingenuous and misplaced, he prefaces the nonsense on page 24 with "*Although not directly raised in District court, one wonders whether the facts of this case sustain a claim of administrative res judicata*..... He continues stating; "*In this case, petitioner had a hearing before the administrative board designed to resolve the disputes which are raised in the instant complaint. The final determination of these facts by those officers that nothing improper was done should also bar the resurrection of those claims at this time.*"

Is this licensed attorney arguing to the Highest Court in the land that an administrative hearing somehow preempts a citizen's constitutional right to judicial review? The doctrine of res judicata is only revelant in employment cases where an employee fails to exhaust all of his administrative remedies prior to seeking judicial review. No adverse administrative employment decision, by itself, automatically preempts or bars a citizen from his constitutional right to judicial access. Moreover, for counsel to submit such nonsense to this prestigious court, pretending to "*wonder*", is clearly disrespectful and patently disingenuous. Even more repugnant, is his admission that while this nonsense was not raised in district court, he still insists on sneaking in clearly inadmissible arguments pretending to "*wonder*". Wondering, like weighing of the facts, is the province and prerogative of a jury.

VI. If *Wondering* is Admissible.....

In light of all the conflicting material facts, and binding case law covering motions for summary judgments, it is Petitioner who should be "*wondering*". Petitioner should "*wonder*" how a simple summary judgment case, **with more genuine issues than bombs in a Iraqi minefield,** could require the valuable time and scrutiny of the highest court in the land. He also should wonder why two lower courts *weighed evidence* and affirmed this preposterous case? But there is not need for any of us to "*wonder*". *Wondering*, or weighing the facts, is reserved for a jury of petitioner's peers.

In Haines v. Kerner, U.S. 404, 519, this court has held that "*it must be beyond any doubt that a pro se litigant cannot get relief under any set of facts*". Neither the Respondents or the lower courts have "*answered the bell*" required by Haines; notwithstanding the clear and unambiguous holdings articulated in Anderson. Id. at 248.

Conclusion

It is tautological but must be restated by petitioner. *"Because the trial and appellate decision violate petitioner's constitutional right to trial, it is in direct conflict with Anderson,Burdine, Catrone, Haines and other controlling case law. For these compelling reasons the memorandum decision of the Ninth Circuit Court of Appeals should be summarily reversed, vacated and this action remanded to United States District Court for the District of Nevada. In the alternative, the petition for a writ of certiorari should be granted*

Respectfully submitted,

Ray Watson